FOR ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-838

STATE OF MAINE AND MICHAEL R. PETIT, COMMISSIONER OF THE DEPARTMENT OF HUMAN SERVICES, STATE OF MAINE,

Petitioners,

v.

JOLINE THIBOUTOT AND LIONEL THIBOUTOT, AND ON BEHALF OF OTHERS SIMILARLY SITUATED,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

I. INTRODUCTION

This Reply Brief is in answer to Respondents' Brief dated March 28, 1980. Preliminarily, petitioners believe it is unnecessary to refute each and every assertion of respondents Thiboutot. Consequently, the following comments will be limited to those arguments and statements which petitioners have determined are particularly erroneous. Petitioners also note that much of respondents' brief appears to be predicated upon several theories pertaining to the applicability of 42 U.S.C. §1983 propounded by Justice White in *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 646-672 (1979). Petitioners, in response thereto, adopt Justice Powell's reasoning in *Chapman, id.*, at 623-646. Additionally, the language found on pages 4 and 5 of this Brief was adopted virtually verbatim from the Supreme Court Brief filed on behalf of Respondent G. Thomas Riti in *Gonzales et al. v. Young*, No. 77-5324 at 27-30.

II. RESORT TO EXTRINSIC SOURCES IS NECESSARY FOR A CORRECT INTERPRETATION OF "AND LAWS"

Respondents mistakenly argue that the meaning of the words "and laws" as contained in 42 U.S.C. §1983 is plain, thereby precluding any review of the legislative and social history surrounding the enactment thereof. (R. 8,13). However, as demonstrated by the number of court opinions dealing with the proper interpretation of the above phrase, it is clear that the import of those words is far from evident, *e.g., Chapman, supra; Lynch v. Household Finance Corp.*, 405 U.S. 538 (1971). In fact, when confronted with a problem of statutory interpretation or construction similar to the one *sub judice*, this Court has often resorted to related statutes in order to analyze appropriately the true meaning and legislative intent of statutory phrases. *Chapman, supra; Examining Board of Engineers, Architects and Surveyors v. Flores De Otero*, 426 U.S. 572 (1976); *District of Columbia v. Carter*, 409 U.S. 418 (1973).

Justice Brennan, prior to formulating the Court's response to a question concerning whether the District of Columbia constitutes a "State or Territory" within the meaning of 42 U.S.C. §1983, stated:

> Indeed, such "[w]ords generally have different shades of meaning, and are to be construed if reasonably possible to effectuate the intent of the lawmakers; and this meaning in particular instances is to be arrived at, not only by a consideration of the words themselves, but by considering, as well, the context, the purposes of the law, and the circumstances under which the words were employed." (cases cited).

Id. at 420. Similar methods of construing statutory meaning were utilized by Justice Blackmun in *Examining Board v. Flores De Otero, supra* at 580, citing *Dist. of Columbia, id.*

Although not involving the interpretation of section 1983, *Cass v. United States*, 417 U.S. 72, 77 (1974), lends support to the proposition that "[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination'." Citing *United States v. American Trucking Assn's., Inc.*, 310 U.S. 534, 543-544 (1940); *Harrison v. Northern Trust Co.*, 317 U.S. 476, 479 (1943).

III. BASED UPON AN HISTORICAL PERSPECTIVE §1983 WAS NOT INTENDED TO REMEDY VIOLATIONS OF ALL FEDERAL STATUTES

The Court has correctly stated that "[a]ny analysis of the purposes and scope of §1983 must take cognizance of the events and passions of the time at which it was enacted." *Dist. of Columbia* at 425. However, respondents have substantially disregarded this advice which has resulted in their incomplete analysis of the phrase "and laws". Had respondents considered the sordid state of affairs that existed in the south during the reconstruction days, they would have properly concluded that §1983 was enacted to provide an avenue of redress for a violation of Fourteenth Amendment rights or equal (civil) rights under previous civil rights acts or related constitutional amendments.

Instead, respondents incorrectly argue that a comparison of similar words contained in statutes related to §1983 and enacted in 1874 leads to the contrary conclusion that the contested phrase "and laws" encompasses all federal laws. (R. 9, 10, 19). However, this argument overlooks the recognized fact that §1983 and its jurisdictional counterpart (§1343(3)) are complementary, having derived from the identical source of the Act of 1871. *Lynch v. Household Finance Corp.*, 405 U.S. at 540, 543, n. 7; *Chapman*, 441 U.S. at 616; *Examining Board v. Otero De Flores, supra* at 583. This common genesis provides for additional weight to be accorded to the premise that §1983 should be restricted to the meaning of the words found in §1343(3), or, to laws providing for equal rights as found in the Constitution and the Civil Rights Act of 1866.

In fact, the Court noted in *Lynch, supra* at 545, that the "broad concept of civil rights embodied in the 1866 Act and in the Fourteenth Amendment is unmistakably evident in the legislative history of §1 of the Civil Rights Act of 1871 . . ." Moreover, the legislative history indicates that §1 of the 1871 Act was designed precisely to enforce, in a federal civil action, the substantive rights enunciated in the 1866 Act which were subsequently included in the Fourteenth Amendment. Representative Shellabarger of Ohio, the floor manager of the bill in the House, stated that:

> The model for [§1 of the 1871 Act] will be found in the second section of the Act of April 9, 1866, known as the 'Civil Rights Act.' That *section provides a criminal proceeding in identically the same case as this one provides a civil remedy for*, except that the deprivation under color of State law must, under the Civil Rights Act, have been on account of race, color or former slavery. *This section* of the bill, on the same state of facts, not only *provides a civil remedy* for persons whose former condition may have been that of slaves, but also to all people *where, under color of State law, they* or any of them *may be deprived of rights to which they are entitled under the Constitution* by reason and virtue of their national citizenship." Cong. Globe, 42d Cong., 1st Sess., app. 68 (1871) (*emphasis added*).

It is at once clear that the "constitutional" rights, as contemplated by §1 of the 1871 Act, were the very rights which Congress took pains to specify in §1 of the 1866 Act for the purpose of affording equality to the newly emancipated blacks. To the extent, however, that the 1871 Act is limited to enforcing rights violated "under color of State law," it is narrower than §1 of the 1866 Act. But to the extent that it affords relief to all people, and not just former slaves, it is consistent with Congress' original understanding of the Thirteenth Amendment respecting equality which was subsequently made manifest in the Fourteenth Amendment. This theme was re-affirmed by Representative Arthur of Kentucky, an opponent of the 1866 and 1871 Acts, who described the reach of §1 of the 1871 Act as "cumulative, as far as it goes, with certain provisions in the [1866] civil rights bill." Cong. Globe, 42d Cong., 1st Sess., 365 (1871).

Likewise, Senator Edmunds recognized the substantive interplay between the Fourteenth Amendment and the 1966 Act:

> The first section [of the 1871 Act] is one that I believe nobody objects to, as defining the rights secured by the Constitution of the United States when they are assailed by any State law or under color of any State law, and *it is merely carrying out the principles of the civil rights bill [of 1866] which have since become a part of the Constitution.*" Cong. Globe, 42d Cong., 1st Sess., 568 (1871) (*emphasis added*).

Representative McHenry declared that §1 of the 1871 Act "is intended as an amendment to the Civil Rights Act [of 1866]" which "gives a civil remedy for the deprivation of rights, privileges and immunities secured by the Constitution. ..." Cong. Globe, 42d Cong., 1st Sess., 429 (1871).

When §1 of the 1871 Act refers to rights "secured by the Constitution," it clearly applies to the rights set forth in the 1866 Act which were subsequently constitutionalized, at least against state deprivation, in the Fourteenth Amendment, and later restated in the 1870 Act in the form of implementing legislation. The point is, then, that the 1871 Act was uniformly understood to provide a civil remedy to enforce the equal rights of national citizens as specified in the Fourteenth Amendment and its implementing legislation as contained in the 1866 and 1870 Acts.

It is, therefore, not surprising that when in 1874 all federal statutes were revised and modified, language was added to the successors of §1 of the 1871 Act to clarify this understanding. Petitioners submit that neither Congress nor the revisers of the statutes ever intended to enlarge the original reach of §1 of the 1871 Act by enacting R.S. 1979. Rep. Shellabarger specifically referred to the kinds of rights to be protected by §1 of the Act of 1871, and, petitioners urge, by R.S. 1979.

> . . . [i]t seems clear that §1 of the Act, with which we are here concerned, was designed primarily in response to the unwillingness or inability of the state governments to enforce their own laws against those violating the *civil rights* of others. (*emphasis added*). *Dist. of Columbia v. Carter*, 409 U.S. 418, 426 (1973).

Since the *Chapman* case decided that the Social Security Act is not one providing for equal or civil rights (*id.* at 621, 623), and since the rights to be secured by the Constitution "and laws" were civil rights, respondents' broadly expanded definition of "and laws" must fail.

Petitioners find it somewhat ironic that respondents insist that the words "and laws" be subject to a strict, plain meaning standard, while simultaneously asserting that the phrases "and laws", "or laws", and "any laws" be given the identical meaning (R. 10, 15). Also, as Amici States have demonstrated (*Amici 9*), an anomaly will result if respondents' quest for a broadening of the §1983 cause of action is successful, since, due to *Chapman*, federal jurisdiction will not henceforth always be available for violations of the Social Security Act.

IV. RESPONDENTS' RELIANCE ON SEVERAL DECISIONS IS MISPLACED

Respondents rely on *United States v. Price*, 383 U.S. 787 (1966), in support of their argument that the "and laws" pro-

visions of §1983 must be read broadly to cover all federal laws. *Price* involved, *inter alia*, the dismissal by a Federal District Court of a conspiracy indictment drawn under §241. The indictment concerned the brutal murders of three persons allegedly by members of the sheriff's office in concert with civilian co-conspirators. In contrast, the case at bar contains *no* allegations of deliberate wrongdoing and can easily be distinguished factually in all aspects from *Price*. Although the *Price* Court implied that §242 and §1983 are to be read broadly, the implication was made in the context of a criminal proceeding and did not address the principles enunciated by Justice Powell in *Chapman* at 641-644.

Respondents appear to be overly impressed by the number of cases which have been decided involving statutory claims raised under §1983 (R. 23, 24). However, all of these cases arose prior to *Chapman* (placing in doubt their jurisdictional basis), and all but three involved pre-42 U.S.C. §1988 (Attorneys Fees Awards Act) litigation. Concerning *Bomar v. Keyes*, 162 F.2d 136 (2d Cir. 1947) (R. 25), suffice it to say that the Second Circuit treated §1983 both as a cause of action and as a jurisdictional grant, without a reference to §1343(3) and its "equal rights" limitation. Of course, *Chapman* disposed of the concept of §1983 granting jurisdiction.

V. CLARIFICATIONS

Two additional points merit further reply. Concerning the amount of attorney's fees at issue herein, respondents' counsel has claimed the amount of $5,622.06 for his services as of October 6, 1977 (A.37-38, R.3). In connection therewith, respondents assert that the State of Maine has never contested the reasonableness of that amount (R.3), but neglect to mention that that very issue was remanded to the Superior Court by the Supreme Judicial Court for future determination (A.64-65). If respondents prevail in this matter, and allegations of violations of all federal statutory provisions are found to be within the meaning of §1983 and therefore §1988, the concept of *pro bono* legal work will be moribund, not to mention the increased amount of litigation likely to ensue for the purpose of deciding whether or not any federal statute will be exempted from the potential largesse of this case.

In their main Brief, petitioners inadvertently neglected to include the case of *Bond v. Stanton*, 528 F.2d 688 (7th Cir.),

vacated and remanded, 429 U.S. 973 (1976), *opinion on remand*, 555 F.2d 172 (1978), among the kind of cases cited by Senator Kennedy to which the Fees Act was intended to apply. (Pet. Brief 21-22). It is petitioners' contention that the Senator cited this case as authority for granting fees against those state officials who operate in bad faith and whose wrongdoing was apparent.

In conclusion, petitioners cannot agree with respondents' suggestion for resolving this matter. Respondents would have this Court avoid the thicket apparent in the legislative history of §1983 and "[i]gnore the twists and turns of the now almost vanished trail of legislative history and read §1983 as Congress enacted it." (R.21). Petitioners suggest instead that the Court resolve the matter before it by viewing the interpretation of "and laws" in light of the social and political turmoil that existed at the time of the enactment of §1983 and its predecessors. Certainly, it would be incredible to conclude that a good faith error in the interpretation of complex federal Social Security regulations could lead to a violation of respondents' rights as contemplated by the drafters, legislators, and revisers of the Civil Rights Act of 1871 and R.S. 1979.